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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 739.

IN THE MATTER

of

The Application of
JOHN MIGUEL and RALPH BROWN,
Petitioners,

FOR AN ORDER

—against—

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AND FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,
Respondents.

PURSUANT TO ARTICLE 78, CIVIL PRACTICE ACT.

PETITION FOR REHEARING OF THE DENIAL OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT.

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To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioners, John Miguel and Ralph Brown, present their petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

Grounds for Rehearing.

The respondents have not made as much as a pretense to refute the undeniable fact that the current construction of Section 813 c of the New York Code of Criminal Procedure requires each of the separately indicted petitioners as a condition for the vindication of his constitutional rights, to furnish evidence in relation to the circumstances of the crime alleged in the absence of immunity so broad that the risk of his prosecution is ended altogether. (*Matter of Doyle*, 257 N. Y. 244, 251 [1931]). This contention of respondents is likewise opposed to *Counselman* v. *Hitchcok*, 142 U. S. 547, 562 (1892).

Respondents' further argument is disingenuous in its assertion that the privilege against self-incrimination is not included in the concept of due process of law. Neither *Adamson* v. *California*, 332 U. S. 46 (1947) nor *Twining* v. *New Jersey*, 211 U. S. 78 (1908), touched even remotely upon the issues involved in the instant petition wherein the claims of privilege against self-incrimination are combined with the guarantee against arrest and search and seizure in the absence of probable cause. Since *Ker* v. *California*, 374 U. S. 23 (1963), self-incrimination has definitely been integrated with the principles of the Fourth Amendment into the warp and woof of due process as provided by

section 1 of the Fourteenth Amendment (*Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Henry* v. *U. S.*, 361 U. S. 98 (1961); *Giordenello* v. *United States*, 357 U. S. 480 (1958); *Albrecht* v. *United States*, 273 U. S. 1, 5 (1927); cf. *Sarafite J. People etc.* v. *Miguel Rivera*, New York Supreme Court, New York County, Volume 149—No. 48 New York Law Journal, p. 15, column 5, 6, 7 (March 12, 1963); Broeder, *The Decline and Fall of Wolf* v. *Colorado* (338 U. S. 25, 1949); 41 Nebraska Law Review 185 (1961): Mr. Justice Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L. Rev. 1, 13 (1960); Fraenkel, Concerning Searches and Seizure, 34 Harv. L. R. 361 (1921).

In the event that the judicial gloss placed upon section 813 c of the New York Code of Criminal Procedure, and evidentally upon Rule 41 e of the Federal Rules of Criminal Procedure as well, necessitates either a statement under oath or testimony from each indicted defendant, who alone as in this proceeding has the information to contradict the arresting officers as to the legality of his arrest, the evolution of the interpretation of the Bill of Rights from *Boyd* v. *United States*, 116 U. S. 616 (1886), to *Ker* v. *California*, *supra*, 374 U. S. 23, has become a nullity to the pre-trial stage where the thrust of that evolution is authoritatively most essential. (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]).

The position of respondents illuminates the prescience of Alexander Hamilton in pointing out that any definition of rights leaves the utmost latitude for evasion (The Federalist, No. 84 at 579 Cook, ed. 1961). In spite of the Ninth Amendment as a reenforcement (Patterson, The Forgotten Ninth Amendment [1955]), the ultimate denial

of certiorari herein means that whereas the privilege against self-incrimination, independently, protects a witness when he is merely potentially subject to indictment, it is unavailing to an indicted defendant in conjunction with the guarantee against arrest and search and seizure for lack of probable cause in the context of due process.

Respondents' arguments are equally fatuous that petitioners have sought to avoid a state decision upon the merits of their claim; that a constitutional remedy exists to establish its merits under State Law; or that the grant of review "would expose every State criminal prosecution to insupportable disruption." In short, the point is that information once disclosed can neither be recalled nor its use thereafter by the prosecution erased.

The library of the Association of the Bar of the City of New York did not receive a copy of the January 1964 issue of the Yale Law Journal, Vol. 73 No. 3, until February 20th, 1964, owing no doubt to its delayed publication. This recognizes that under 28 U. S. C. A., section 1257, "the denial of a prerogative writ by a state court whether or not the writ is ancillary to other litigation is a final judgment." (The requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L. J. 515, 528.) This line of precedents to this effect (id., note 64) is almost as old as the statutory finality requirement of Section 1257 (id.).

As this recently published comment elucidates, the finality doctrine has been generally relaxed in other aspects (*Local, etc.* v. *Curry*, 371 U. S. 542 (1963); *Mercantile Natl. Bank* v. *Langdeau*, 371 U. S. 555 (1963)). The recognized departure from the original stringent rule of

finality in *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201 (1848), had formerly been restricted to orders directing transfers of property (73 Yale L. J., *supra*, 521 Note 33).

That is of utmost significance in this instance. During the very month that *Weeks* v. *United States*, *supra*, 232 U. S. 383, was decided, the Late Professor Corwin revealed the juristic philosophy of vested rights as the premise for Constitutional law. (The Basic Doctrine of Constitutional Law, 12 Michigan Law Review, 247 (February 1914)): see also, his article referred to therein (id., 276 "The Doctrine of Due Process Before the Civil War", 24 Harv. L. R. 366 [1911]).

The conclusion is therefore plain that self-incrimination cannot in practice, emerge from the influence of the period, when the principal concern of judicial review was the protection of property rights against legislative action, until an indicted defendant may not be forced under oath to speak or divulge facts in writing or otherwise upon seeking to sustain his constitutional guarantees against self-incrimination and illegal arrest within the area of due process. The inconsistency of this outcome under New York Law, in view of the protection awarded thereby to a defendant against police interrogation while being unlawfully detained prior to his indictment, is glaring (*People* v. *Donovan*, 13 N. Y. 2nd 148; 243 N. Y. Supp. 2nd 841 [October 8, 1963]). The inconsistency is equally glaring under federal law through the contrast between the insistence of the 18th century reformers upon the sanctity of the home under the guarantee against unlawful search and seizure, and the current elevation of the dignity of the person in immunizing him from arrest either without cause or

in defiance of constitutional right (Mr. Justice Brennan, dissenting in *Lopez* v. *United States*, 373 U. S. 427, 446 and seq. (1963)). It is submitted that the foregoing contentions have manifestly been strengthened by the disposition of four members of the Court with respect to the Bill of Rights during the recent argument of *Malloy* v. *Hogan* (32 U. S. L. W. 3309).

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department be granted.

Respectfully submitted,

FREDERIC A. JOHNSON,
RUDOLPH LION ZALOWITZ.

Certificate of Counsel.

I, Frederic A. Johnson (Rudolph Lion Zalowitz), counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Counsel for Petitioners.